

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ANDREW SILVERSTEIN,
Petitioner.

Nos. 2 CA-CR 2013-0190-PR and 2 CA-CR 2013-0195-PR (Consolidated)
Filed December 16, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR20103457002

The Honorable Teresa Godoy, Judge Pro Tempore

REVIEW GRANTED; RELIEF GRANTED IN PART

COUNSEL

Thomas C. Horne, Arizona Attorney General
By Michael Jette, Assistant Attorney General, Tucson
Counsel for Respondent

Isabel G. Garcia, Pima County Legal Defender
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Counsel for Petitioner

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Andrew Silverstein seeks review of the trial court's order denying his petition for post-conviction relief and the court's denial of his request for counsel that accompanied his subsequent notice of post-conviction relief, which Silverstein characterizes as a "de facto" dismissal of that notice. We grant review and partial relief.

¶2 After being indicted for forty-six offenses stemming from a series of real estate transactions, Silverstein pled guilty to conspiracy, theft, money laundering, and illegally conducting an enterprise. The trial court suspended the imposition of sentence and placed Silverstein on concurrent terms of probation, the longest of which was seven years. The plea agreement provided that Silverstein would pay restitution to the "various victims" and that the restitution amount would be capped at \$1,000,000 and based on "individual . . . victims' affidavits." At the sentencing hearing in January 2012, the court "retain[ed] jurisdiction over the issue of restitution."

¶3 In February 2012, the state filed a "Motion to Clarify," stating it had been unable to reach a stipulation with Silverstein regarding the amount of restitution, and asked the court to order restitution totaling \$574,952.25. The motion did not list the victims or the individual amounts of restitution requested for each victim. The trial court, noting Silverstein had not responded, granted the motion and entered what it titled a "Restitution Order" on March 6, 2012. That order, consistent with the state's motion, stated that "restitution is ordered as follows" for "(1) Down Payments valued at \$436,688; and (2) Rental Premiums valued at \$138,264.25."

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¶4 Silverstein filed a motion for reconsideration, arguing the state's documentation did not support the restitution figure, many of the individual claims were "specious" or "unsubstantiated," the state "should be required to at least justify how it arrived at the figures it proposed," and Silverstein is entitled to "credit" for a \$120,000 payment made to the Arizona Attorney General's Office "in the companion civil case." He claimed restitution should instead total \$275,468.71 and provided a spreadsheet listing approximately eighty victims. The record does not contain a ruling by the court on that motion.¹

¶5 At the same time, Silverstein filed a notice of post-conviction relief stating he intended to pursue relief "from the judgment and sentence . . . entered on January 10, 2012."² He then filed a petition for post-conviction relief arguing: 1) the March 6 order did not comply with A.R.S. § 13-804(H) because it did not include the "total amount of restitution owed to each person" or the "manner in which the restitution is to be paid," and thus should be vacated for "further sentencing proceedings to identify the victims, their direct economic losses, [and] the manner in which the restitution is to be paid"; 2) the state had failed to produce "victim affidavit[s]" as required by the plea agreement and that the victim impact statements provided were inadequate; 3) the amount listed in the March 6 order improperly "include[d] money" for victims not listed in the indictment; and 4) his claims are not precluded because, relying on *State v. Vermuele*, 226 Ariz. 399, 249 P.2d 1099 (App. 2011), he was "not required to object at sentencing in order to raise" the issues in a post-conviction proceeding.

¶6 The trial court summarily rejected Silverstein's claim based on § 13-804(H), determining that its failure to comply with the

¹At a later status conference, based on the comments by the state and codefendant's counsel, the trial court determined it had, in fact, denied the motion.

²Sentencing occurred on January 9 and the sentencing minute entry was entered January 18.

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statutory requirements was merely “technical” and that relief was unavailable pursuant to Rule 32.1. It further determined that restitution properly included victims not listed in the indictment. It concluded, however, that Silverstein had presented a colorable claim whether the restitution amount properly could be supported by victim impact statements rather than affidavits and set an evidentiary hearing.

¶7 No evidentiary hearing was held, however. At a status conference, the state provided the court with the victim impact statements and the parties agreed that the state had not placed the victims under oath for the making of those statements. The court then took the matter under advisement, issuing a ruling approximately two weeks later. The court determined Silverstein had waived any claim that affidavits were required instead of victim impact statements because he did not object to the use of victim impact statements despite having had ample opportunities to do so. The court also determined that the use of such statements would not violate the terms of the plea agreement in any event.

¶8 Although the question does not appear to have been raised squarely by Silverstein in his petition for post-conviction relief, the trial court went on to evaluate whether the victim impact statements provided supported the amount of restitution provided in the March 6 order. The court then ordered that “the current restitution order be modified as set forth in the attached amended restitution order.” The attached “order” consisted of a list of victims with the restitution owed to each, for a total restitution amount of \$405,132.25. The court declined to award restitution to some victims based on victim impact statements that did not show a claim or lacked sufficient information. For four other victims, the court “retain[ed] jurisdiction over restitution” for various reasons, including because documentation was corrupted or missing from the compact disc of materials provided by the state.

¶9 The state filed a motion for rehearing, asserting that several victims had provided “ample supporting documentation for their claims” despite not having listed the amount on their respective victim impact statements. It further stated that any victim

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that had been “paid in any Arizona Attorney General civil action” would not be “allowed” to claim restitution. The court denied the state’s motion for rehearing and subsequent motion for reconsideration. The court, however, granted the state’s motion to calculate restitution for claims of three of the victims over which the court had retained jurisdiction, and it subsequently issued an order stating those victims were owed restitution totaling \$16,040.³

¶10 Silverstein then filed a new notice of post-conviction relief referring to what he described as the trial court’s “partial resentencing.” He also requested the appointment of new counsel for the new post-conviction proceeding or, alternatively, that the court stay the new proceeding pending resolution of the petition for review he intended to file with this court seeking review of the trial court’s rulings denying him post-conviction relief. The court denied the motion. Silverstein then filed petitions for review in this court, the first challenging the trial court’s orders denying his petition for post-conviction relief and its subsequent orders related to restitution, and the second challenging the court’s denial of his request for counsel or for a stay.

¶11 Because it is material to the remainder of our analysis, we first address Silverstein’s arguments that the court could not rely on victim witness statements in lieu of affidavits in establishing the amount of restitution and that it improperly included in the restitution amount payments to victims not named in the indictment.

¶12 Again relying on *Vermuele*, Silverstein contends the trial court erred in concluding that he had waived his objection to the use of victim witness statements in lieu of affidavits. He argues that, pursuant to *Vermuele*, he was not required to object because he had “no specific procedural avenue” to do so before the court entered the restitution order. Silverstein reads our decision in *Vermuele* too broadly. There, we determined that a defendant was not required to object after his sentence had been announced because the sentence was final upon pronouncement and he had no “express procedural

³ No restitution was awarded as to the fourth victim, apparently because she was “still living in the home.”

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opportunity” to object beforehand. 226 Ariz. 399, ¶¶ 7-10, 249 P.2d at 1101-02. But of critical import to our ruling was that “the basis for [the defendant’s] claims did not become apparent until the court’s pronouncement of the sentence.” *Id.* ¶ 6. Silverstein plainly was aware the state intended to rely on victim witness statements well before the trial court entered the March 6 order, but he failed to respond to the state’s motion asking the court to enter that order. Thus, the trial court did not err in concluding Silverstein had ample opportunity to object. Our concern in *Vermuele* about the “procedurally unique” finality of sentencing is not present here. *Id.*

¶13 Moreover, Silverstein offered an alternative calculation of restitution in his motion seeking reconsideration of the March 6 order. Given that it appears no affidavits were available, that calculation must have been based on the same victim witness statements Silverstein now asserts are insufficient. *Cf. State v. Towery*, 186 Ariz. 168, 182, 920 P.2d 290, 304 (1996) (parties generally estopped from taking inconsistent position in successive or separate actions). By failing to respond to the state’s motion and by relying on the victim witness statements in offering his own restitution calculation, Silverstein plainly waived this argument before seeking post-conviction relief and is therefore precluded from raising the claim. *See* Ariz. R. Crim. P. 32.2(a)(3).

¶14 Silverstein also suggests that the use of victim witness statements to determine restitution constituted fundamental error subject to challenge even absent a proper objection. But fundamental error may still be subject to preclusion. *State v. Swoopes*, 216 Ariz. 390, ¶¶ 41-42, 166 P.3d 945, 958 (App. 2007). And, in any event, Silverstein cites no authority and develops no argument that the use of victim witness statements to determine restitution in these circumstances would be fundamental error. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument waives claim on review); *see also State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived if not asserted on review). Accordingly, we do not address this argument further.

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¶15 To the extent Silverstein seeks to reassert his argument concerning victims not named in the indictment, he has waived this claim and is thus precluded from raising it in a Rule 32 proceeding.⁴ See Ariz. R. Crim. P. 32.2(a)(3). Like the use of affidavits to determine the amount of restitution, Silverstein had ample opportunity to object to the victims included in the state’s restitution calculation and failed to do so. And, in any event, Silverstein listed victims not named in the indictment in his alternate calculation of restitution. And, because he did not raise it in his petition below, we do not address Silverstein’s argument that the trial court’s restitution order was defective because it did not expressly determine whether any victim’s loss had been caused by Silverstein’s conduct. See Ariz. R. Crim. P. 32.9(c)(1)(ii) (petition for review limited to “issues which were decided by the trial court”); *State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (issues may not be raised properly for first time in petition for review).

¶16 Citing Rule 32.1(c), Silverstein also claims on review that the March 6 order was not “in accordance with the sentence authorized by law” because it did not comply with § 13-804(H). He further claims that the trial court was not permitted to modify the March 6 order and was instead required to vacate it and “conduct further sentencing proceedings.”

¶17 Section 13-804 describes the procedure a trial court must follow in imposing restitution for the economic losses of crime victims. See A.R.S. § 13-603(C). The first step is for the court to determine the amount of restitution by “consider[ing] all losses caused by the criminal offense or offenses for which the defendant has been convicted.” § 13-804(B). After doing so, the court or a designated court staff member must “specify the manner in which the restitution is to be paid” by, inter alia, contacting any victim who has requested notice and accounting for the views of the victim and

⁴Although the trial court relied on different grounds to reject Silverstein’s claim that the restitution amount included victims not named in the indictment, we can affirm the trial court’s ruling for any reason supported by the record. See *State v. Banda*, 232 Ariz. 582, n.2, 307 P.3d 1009, 1012 n.2 (App. 2013).

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the economic circumstances of the defendant. § 13-804(E). The court must then “enter a restitution order for each defendant that sets forth all of the following: . . . The total amount of restitution the defendant owes all persons[, t]he total amount of restitution owed to each person[, and t]he manner in which the restitution is to be paid.” § 13-804(H).

¶18 We agree with Silverstein that the March 6 order did not comply with § 13-804(H). Although it provided a total amount of restitution, it did not include the total amount owed to each victim nor the manner in which Silverstein would pay restitution. And we agree with Silverstein that the lack of compliance is a cognizable claim pursuant to Rule 32.1(c) and the trial court erred in characterizing it as merely technical error. Rule 32.1(c) permits post-conviction relief on the basis that a sentence is “not in accordance with the sentence authorized by law.” And, for a pleading defendant like Silverstein, post-conviction relief is the only avenue available for review of a post-judgment restitution order. *See Hoffman v. Chandler*, 231 Ariz. 362, ¶¶ 9, 17, 295 P.3d 939, 940, 941-42 (2013).

¶19 The March 6 order lacked findings to reflect the trial court had evaluated the evidence supporting the individual restitution amounts and Silverstein’s ability to pay, as required. *See* §§ 13-804(E), (H). Absent those findings, the order was effectively unenforceable because there would be no way to discern to whom Silverstein’s restitution payments should be distributed or even if Silverstein’s payments were sufficient. *See generally* A.R.S. §§ 13-804, 13-805.

¶20 But we reject Silverstein’s claim that the trial court was not permitted to modify the restitution order to enter an order compliant with § 13-804(H). Silverstein asserts that a trial court’s authority to modify a restitution order is limited by § 13-804(M) to modifying the manner in which restitution is paid and that our conclusion in *State v. Foy*, 176 Ariz. 166, 168-69, 859 P.2d 789, 791-92 (App. 1993), that a court may increase an existing restitution order, is incorrect.

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¶21 As we noted above, the trial court concluded – albeit erroneously – that Silverstein’s claim was not cognizable under Rule 32. Thus, it did not rely on its authority under Rule 32 to modify the restitution amount. But we may affirm a trial court’s final determination if it is correct for any reason. *See State v. Banda*, 232 Ariz. 582, n.2, 307 P.3d 1009, 1012 n.2 (App. 2013). Here, Silverstein sought review of the restitution amount pursuant to Rule 32. A trial court obviously must have the authority to modify a restitution amount in order to grant relief pursuant to such a proceeding. *See* Ariz. R. Crim. P. 32.8(d) (in granting relief, court must issue “appropriate order with respect to the conviction, sentence or detention”).

¶22 Silverstein further claims the trial court was required to “vacate the [March 6] order and order further sentencing proceedings.” Although that approach would often be preferred, Silverstein does not explain why that procedure is necessary to correct a lack of compliance with § 13-804(H) if the court has before it the evidence to make the required determinations. As we have explained, Silverstein waived his substantive claims that the restitution order included victims not named in the original indictment and was improperly based on victim witness statements. And he has not identified any other reason to conduct additional sentencing proceedings. Indeed, we observe that the court’s decision actually benefited Silverstein because the court reduced the amount of restitution owed.

¶23 We recognize, however, that the relief the trial court ultimately gave was incomplete because the restitution orders, even if read as a whole, still do not comply with § 13-804(H). Although those orders do contain “[t]he total amount of restitution the defendant owes to all persons” and “[t]he total amount of restitution owed to each person,” they do not address “[t]he manner in which the restitution is to be paid.” § 13-804(H). Accordingly, we are compelled to grant partial relief.

¶24 We need not address the additional claims raised in Silverstein’s petition for review in CR 2013-0195-PR. There, he complains that the trial court erred in refusing to stay his most-

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recent notice of post-conviction review until this court ruled on his petition for review in CR 2013-0190-PR and to appoint an attorney to represent him in his new post-conviction proceeding. Because we remand for the trial court to enter a restitution order compliant with § 13-804(H), these arguments are moot. Nothing in this decision, however, precludes Silverstein from filing a new notice of post-conviction relief from that order and requesting that counsel be appointed pursuant to Rule 32.4(c). *See State v. Rosales*, 205 Ariz. 86, ¶ 8, 66 P.3d 1263, 1266 (App. 2003) (noting defendant may begin new post-conviction proceeding after resentencing).

¶25 For the reasons stated, we grant review and partial relief. We remand the case to the trial court for it to enter a restitution order compliant with § 13-804(H). We deny relief in all other respects.